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No. 84-1167

In the Supreme Court of the United States

OCTOBER TERM, 1984

ENIS M.I. PINAR, PETITIONER

v.

ELIZABETH H. DOLE, SECRETARY OF TRANSPORTATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether direct judicial review of minor disciplinary actions taken against a federal employee is precluded by the comprehensive remedial scheme established by Congress in the Civil Service Reform Act of 1978.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-29a) is reported at 747 F.2d 899. The bench ruling of the district court (Pet. App. 31a-32a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 22, 1984. The petition for a writ of certiorari was filed on January 18, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE AND REGULATIONS INVOLVED

Pertinent provisions of the Civil Service Reform Act of 1978 and regulations thereunder are set out at Pet. App. 33a-58a.

STATEMENT

Petitioner, a police officer employed by the Federal Aviation Administration (FAA), seeks damages from his supervisors in their individual capacities and declaratory and injunctive relief from the FAA in connection with three disciplinary actions taken against him.

1. Petitioner has been a police officer at Washington National Airport since December 1978. On February 11 and 12, 1981, he issued parking tickets to two illegally parked cars registered to members of Congress. On February 13, 1981, respondent Morse, petitioner's immediate supervisor, ordered petitioner to void the tickets; according to the allegations in petitioner's complaint, Morse told petitioner that he was lobbying a Congressman for passage of legislation favorable to airport police and that ticketing Congressmen would jeopardize his efforts. Pet. App. 3a.

More than three months later, Morse disciplined petitioner for being late to roll call. In response, petitioner wrote to another supervisor, respondent Elkins, charging Morse with harassment and also with conduct unbecoming an officer in connection with Morse's February 13, 1981 request that he void the parking tickets. Morse denied the allegations and filed grievances against petitioner for making unfounded accusations. The agency subsequently proposed to suspend petitioner for seven days for making false charges against Morse. After considering the oral and written submissions of petitioner and his attorney, the proposed suspension was reduced to a letter of reprimand, issued December 15, 1981. Petitioner's formal administrative grievance of this action was rejected as untimely. Pet. App. 3a-4a.

In addition to the letter of reprimand, petitioner was the subject of two other minor disciplinary actions during the period in question. On June 14, 1981, petitioner's temporary promotion to the position of Special Functions Officer

(GS-6) was terminated on the ground that he was unresponsive to authority (Pet. App. 4a).[1] Petitioner complained to the Special Counsel of the Merit Systems Protection Board (MSPB) that his promotion had been revoked in retaliation for the exercise of his First Amendment rights, but the Special Counsel found no basis for this allegation (*id.* at 11a). Finally, on February 2, 1982, petitioner's supervisor, respondent Jones, proposed to suspend him for 14 days for mishandling his firearm. Petitioner opposed the suspension with the assistance of counsel and filed a formal grievance. Petitioner ultimately received a two-day suspension. *Id.* at 4a-5a.

2. a. Petitioner brought this action in the United States District Court for the Eastern District of Virginia, alleging that the FAA's personnel actions were arbitrary and capricious and violated the First Amendment, and that his temporary promotion was terminated without due process. The complaint sought declaratory and injunctive relief against the agency as well as damages from petitioner's superiors in their individual capacities. Pet. App. 2a. The district court granted summary judgment for respondents (*id.* at 30a-32a; see *id.* at 2a n.1), reasoning that the comprehensive remedial scheme established by Congress in the Civil Service Reform Act of 1978 (CSRA) precluded judicial review of "modest discliplinary actions" such as those taken against petitioner (Pet. App. 32a).

b. The court of appeals affirmed (Pet. App. 1a-29a). The court first held that petitioner's damages action under

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[1]By letter dated February 17, 1981, petitioner had been temporarily promoted to this position for a period not to exceed one year. The letter, which was acknowledged by petitioner's signature, provided that the promotion could be terminated at any time in the sole discretion of the FAA, and that the termination decision would not be subject to the agency's adverse action or reduction-in-force procedures. Pet. App. 4a; C.A. App. 54.

Bivens v. *Six Unknown Federal Narcotics Agents,* 403 U.S. 388 (1971), was foreclosed by the remedies available to him under the CSRA (Pet. App. 6a-17a). Relying on *Bush* v. *Lucas,* No. 81-469 (June 13, 1983), the court of appeals concluded that a *Bivens* remedy was unavailable because "the [administrative] remedies available to [petitioner] * * * to redress each of the personnel actions taken against him were both comprehensive and constitutionally adequate" (Pet. App. 8a). Although petitioner was not afforded the same protections as the employee in *Bush,* the court of appeals noted that the disclipinary actions here were correspondingly less serious and therefore required less elaborate review procedures (*id.* at 8a, 12a). The court reasoned that petitioner, who was subject to "relatively minor personnel actions[,] * * * should not be permitted immediate judicial relief in the form of punitive damages when such relief has been denied employees [such as the petitioner in *Bush*] who are the subject of more serious personnel actions" (*id.* at 15a).

The court of appeals also determined that the injunctive relief requested by petitioner was inappropriate in view of the remedial scheme established in the CSRA (Pet. App. 17a-25a). Noting that the CSRA expressly provides for judicial review of certain types of major personnel actions, the court concluded (*id.* at 19a) that "[t]he absence of a provision for direct judicial review of prohibited personnel actions [such as those at issue here] among the carefully structured remedial provisions of the CSRA is evidence of Congress' intent that no judicial review in district court be available for the actions involved in this case." The court distinguished *Borrell* v. *International Communications Agency,* 682 F.2d 981 (D.C. Cir. 1982), on the ground that the personnel action there (removal) was substantially more severe than those suffered by petitioner (Pet. App. 21a). The court also held that review of petitioner's claims under the

Administrative Procedure Act was foreclosed under 5 U.S.C. 701(a)(1) because Congress intended the CSRA to "preclude judicial review" of the FAA's actions in this case (Pet. App. 23a-25a).[2]

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or any other court of appeals. The Court recently declined to review claims similar to petitioner's in *Cazalas* v. *United States Department of Justice,* No. 84-56 (Feb. 19, 1985), and there is no reason for a different result here.

In *Bush* v. *Lucas,* No. 81-469 (June 13, 1983), this Court refused to create a *Bivens*-type damages remedy for federal employees whose First Amendment rights have been violated by their superiors. The Court concluded that the "elaborate remedial system that has been constructed step by step, with careful attention to conflicting policy considerations, should [not] be augmented by the creation of a new judicial remedy" (slip op. 21), even though "Congress has provided a less than complete remedy for the wrong" (*id.* at 5).

Although petitioner did not have access to the full range of procedural protections afforded the employee in *Bush,* the same result should obtain for at least four reasons, as noted by the court of appeals (Pet. App. 8a-15a). First, petitioner was subjected to significantly less serious disciplinary action than was the employee in *Bush,* who had been demoted and suffered a decrease in his salary of almost $10,000 (see slip op. 2). Second, the CSRA does afford substantial procedural protections to employees in

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[2]Finally, the court of appeals rejected petitioner's argument that he possessed the property interest in his temporary promotion necessary to give rise to a due process claim (Pet. App. 25a-29a). Petitioner apparently does not now contest this holding.

petitioner's position, protections that petitioner invoked with some degree of success.[3] Third, the public interest in an efficient civil service requires that supervisors be able to impose minor disciplinary sanctions without fear of being haled into court to defend such discretionary actions. Finally, it would be anomalous to allow direct judicial review of the modest actions taken against petitioner when employees who have suffered significantly greater sanctions are relegated to their remedies under the CSRA.

The decision below is consistent with the decisions of other courts of appeals, which have held that federal employees may challenge minor disciplinary actions only through the mechanisms explicitly provided in the CSRA and not through direct judicial review in the guise of *Bivens* actions, suits under the Administrative Procedure Act, or implied private rights of action under the CSRA. See, *e.g.*, *Schrachta* v. *Curtis*, No. 83-2869 (7th Cir. Jan. 21, 1985) (denial of promotion); *Veit* v. *Heckler*, 746 F.2d 508 (9th Cir. 1984) (challenge to performance rating); *Hallock* v. *Moses*, 731 F.2d 754 (11th Cir. 1984) (loss of job responsibilities); *Braun* v. *United States*, 707 F.2d 922 (6th Cir. 1983) (challenge to performance evaluation); *Broadway* v. *Block*, 694 F.2d 979 (5th Cir. 1982) (reassignment without loss of grade or pay). The procedures available to petitioner under the CSRA — including notice, opportunity to be heard, and administrative review (see note 3, *supra*) — are plainly adequate to satisfy the dictates of the Due Process

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[3]Petitioner was given formal notice, an opportunity to respond with the assistance of his attorney, and a written decision at the administrative level; records relating to his suspension were available to petitioner; he filed grievances of the disciplinary actions; and he brought his constitutional claims before the Special Counsel of the MSPB. Pet. App. 8a-10a, 14a; see 5 U.S.C. 1206(a)-(c), 2302(b)(8), 7503; 5 C.F.R. 771.205. Petitioner succeeded in reducing one proposed suspension to a letter of reprimand and reduced another proposed suspension from 14 days to two (Pet. App. at 4a-5a).

Clause in light of the minor nature of the deprivations in question and the substantial governmental interests at stake. *Williams* v. *IRS*, 745 F.2d 702, 704 (D.C. Cir. 1984); see generally *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976); *Goss* v. *Lopez*, 419 U.S. 565, 576 (1975); *Arnett* v. *Kennedy*, 416 U.S. 134 (1974).

The cases cited by petitioner (Pet. 6-8) as being in conflict with the decision below are distinguishable. The First and District of Columbia Circuits have stated that employees alleging serious deprivations not remediable under the CSRA may seek review in federal court. See *Dugan* v. *Ramsay*, 727 F.2d 192 (1st Cir. 1984) (refusal to hire); *Borrell* v. *International Communications Agency*, 682 F.2d 981 (D.C. Cir. 1982) (discharge of probationary employee).[4] Although we believe that these cases were not correctly decided, the more serious nature of the actions suffered by the plaintiffs makes the decisions inapposite to petitioner's claims. The court below did "not address whether the holding of *Borrell* is correct" but rather "decline[d] to extend that holding to the personnel actions

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[4]In *Bartel* v. *FAA*, 725 F.2d 1403 (D.C. Cir. 1984), which involved a refusal to hire, the court stated that the CSRA "preempts a constitutional claim for damages based on conduct remediable under" the Act and that a *Bivens* remedy is limited to challenges to "wrongful conduct for which [the administrative] scheme provides *no* remedy" (*id.* at 1415; emphasis added). The court of appeals remanded to the district court for a determination of "which alleged violations are administratively remediable and hence barred in this case" (*id.* at 1415 n.21). The court of appeals did not decide "which, if any," of the plaintiff's allegations "survive the holding in *Bush*" (*ibid.*). Here, petitioner did have access to administrative remedies, including resort to the Special Counsel of the MSPB (see note 3, *supra*).

at issue here which are substantially less severe in nature" (Pet. App. 21a).[5]

Petitioner's reliance (Pet. 9, 11) on *Barlow* v. *Collins*, 397 U.S. 159 (1970), and *McDonald* v. *City of West Branch*, No. 83-219 (Apr. 18, 1984), is also unavailing. In *Barlow*, the Court, in addressing the reviewability of a regulation under the Administrative Procedure Act, stated (397 U.S. at 166) simply that "preclusion of judicial review of administrative action adjudicating private rights is not lightly to be inferred." As the Court recently made clear in *Block* v. *Community Nutrition Institute*, No. 83-458 (June 4, 1984),[6] the presumption in favor of review is not

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[5]Although the other cases cited by petitioner involved less severe losses than in *Borrell* and *Dugan*, they are also distinguishable. In *Williams* v. *IRS*, *supra*, the employee was not a member of the competitive service and therefore lacked the protections available to petitioner under the CSRA (see 5 U.S.C. 7501(1)). In *Cutts* v. *Fowler*, 692 F.2d 138 (D.C. Cir. 1982) (which, like *Borrell*, was decided before *Bush* v. *Lucas*, *supra*), the court of appeals addressed a challenge to the constitutionality of provisions of the CSRA as applied to the employee, rather than merely, as here, a bare challenge to the legality of the actions taken (692 F.2d at 140-141). More recently, the District of Columbia Circuit has held, in light of *Bush* v. *Lucas*, *supra*, that a federal employee in the pre-CSRA competitive service could not bring a *Bivens* action alleging that an agency's refusal to promote him violated the First Amendment. *Krodel* v. *Young*, 748 F.2d 701, 711-712 (D.C. Cir. 1984).

[6]*Community Nutrition Institute* is not, as petitioner contends (Pet. 9), irrelevant. The Court addressed both whether all review was foreclosed and whether the respondents belonged to a class entitled to seek review (slip op. 5). Nothing in the Court's discussion suggests that its general comments with respect to the availability of review are applicable solely to the latter question. In any event, petitioner, like the respondents in *Community Nutrition Institute*, is not the only party who might seek review of the actions at issue: the Special Counsel of the MSPB has a statutory duty to investigate prohibited personnel actions unless the employee's charge is facially frivolous. See 5 U.S.C. 1206(a)-(c); S. Rep. 95-969, 95th Cong., 2d Sess. 32 (1978); see also *Wren* v. *MSPB*, 681 F.2d 867, 875 n.9 (D.C. Cir. 1982).

irrebutable, and Congress need not expressly state its intent to overcome that presumption (slip op. 5):

> Whether and to what extent a particular statute precludes judicial review is determined not only from its express language, but also from the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved.

The comprehensive scheme enacted by Congress in the CSRA is ample evidence of its intent to preclude judicial review outside that scheme. See *Carducci* v. *Regan*, 714 F.2d 171, 175 (D.C. Cir. 1983); cf. *United States* v. *Erika, Inc.*, 456 U.S. 201 (1982). *McDonald* v. *City of West Branch, supra,* which addressed the preclusive effect of arbitration awards in actions brought under 42 U.S.C. 1983, is obviously inapposite.

Petitioner's contention (Pet. 14; footnote omitted) that the decision below will prevent the courts from remedying "genuinely egregious violations of the Constitution" is plainly incorrect. No such situation is presented by this case, nor does the decision below purport to extend to situations such as the one hypothesized by petitioner (Pet. 14 n.12). The court of appeals' decision reflects a commonsense approach to claims that are so minor that Congress surely never intended that they be reviewable in federal court, lest the judiciary become overwhelmed with "the most rudimentary of personnel matters" and supervisors become "inhibit[ed] * * * from taking even the most minor disciplinary actions for fear of having to justify their actions in federal court" (Pet. App. 20a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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